Tentative Rulings for June 7, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG00723	***Lourdes M. Diaz v. Wells Fargo Bank, N.A.*** **(Dept. 403)**
12CECG01122	***United Bank v. Advanced Masonry*** **(Dept. 503)**
11CECG00232	***Corpuz v. Saint Agnes Medical Center*** **(Dept. 403)**
11CECG02923	***Hagopyan v. Farmer's Insurance Group*** **(Dept. 403)**
11CECG03823	***Fanning v. Mighty Builders*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

10CECG02385	***Perales v. Wells Fargo Bank, et al.*** **(Dept. 402) is continued to Thursday, June 21, 2012, at 3:30 p.m. in Dept. 402.**
12CECG01119	***A-American Storage Management v. CMSS I, L.P.*** **is continued to Tuesday, July 3, 2012 at 3:30 p.m. in Dept. 501.**
11CECG03780	***Calif. Farm Bureau Federation v. County of Fresno et al.*** **(Dept. 502) is continued to Tuesday, June 26, 2012 at 3:30 p.m. in Dept. 502.**

(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: ***Stephen E. Simis v. Wells Fargo Bank, et al.***
Superior Court Case No. 12 CECG 00160

Hearing Date: Thurs., June 7, 2012 (**Dept. 501**)

Motion: Plaintiff's Motion to Set Aside Dismissal of Complaint entered on 3/2/12.

Tentative Ruling:

To GRANT. (**CCP 473 (b).**) The clerk of the court is directed to set aside the dismissal entered on 3/2/12 as to Defendants Wells Fargo Bank and Cal-Western Reconveyance Corp.

Plaintiff intended to dismiss the Complaint with prejudice as against Defendant TFS Investments LLC only. So the clerk's office is directed to enter the dismissal nunc pro tunc on 3/2/12 as to Defendant TFS Investments LLC only.

Analysis:

On 2/28/12, Plaintiff's counsel sent a cover letter asking the court clerk to dismiss the Complaint without prejudice against TFS Investments. But the attached dismissal form mistakenly sought to dismiss the entire Complaint with prejudice. So on 3/2/12, the court clerk dismissed the entire action without prejudice as to all three named Defendants, including Wells Fargo Bank and Cal-Western Reconveyance.

Plaintiff brings this motion to set aside the dismissal on the ground of attorney mistake under **CCP 473 (b)**. Plaintiff's counsel has submitted his affidavit of attorney error. (See generally Burton Decl.)

CCP 473 (b) provides, in relevant part:

Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk

against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

Under this provision, the attorney must submit an attorney affidavit of fault, and the court must find that it was the attorney's error and not the client's error which caused the entry of default. However, this provision is NOT concerned with the reasons for the attorney's mistake. Relief from DEFAULT is mandatory if the application is in proper form and the court accepts counsel's declaration of fault. (**Billings**, 225 Cal.App.3d at 256, 275 Cal.Rptr. at 84.)

Opposition

In Opposition, Wells Fargo argues that mere mistake, inadvertence, or neglect does not warrant relief unless upon a consideration of all the evidence it was found to be excusable. (**Ford v. Herndon** (1976) 62 Cal.App.3d 492, 496.) But this argument fails for two reasons.

1. Attorney error provision does not require showing of excusable neglect

CCP 473 (b) contains two relief provisions. While the first provision requires a showing of excusable neglect, the second provision, which applies to attorney errors, does not require a showing of excusable neglect.

The first provision allows for DISCRETIONARY relief from DEFAULT if filed within 6 months after entry of DEFAULT. The relevant language is as follows:

"The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or EXCUSABLE NEGLECT."

The mistake can be by either the party or the lawyer. But the party must make two separate showings. "Ordinarily, a party seeking relief under section 473 from a judgment, order or other proceeding has the double burden of showing (1) diligence in making the motion after discovering the mistake, and (2) a satisfactory excuse for the occurrence of that mistake. The court must generally consider the facts and circumstances of a case to determine whether the party was diligent in

seeking relief and whether the reasons given for the party's mistake are satisfactory." (**Billings v. Health Plan of America** (1991) 225 Cal.App.3d 250, 255, 275 Cal.Rptr. 80, 84, superseded on other grounds, .)

In other words, under this first provision, a party or attorney can only obtain relief if they can show that the neglect was EXCUSABLE. This is because the negligence of the attorney is imputed to his or her client and may not be offered by the latter as a basis for relief. The client's redress for inexcusable neglect is an action for malpractice. (**Carroll v. Abbott Laboratories** (1982) 32 Cal.3d 892, 898, 187 Cal.Rptr. 592, 595.) The only exception to this rule if the attorney basically abandons the client without notice, amounting to positive misconduct by the attorney, which will not be imputed to the client.

The second provision affords MANDATORY relief if the attorney is willing to file a timely attorney affidavit of fault, showing that the fault was entirely the attorney's and not the clients. There is no requirement that the attorney's mistake be excusable.

The second provision states:

"Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence surprise or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or NEGLECT."

Under this second provision, the attorney must submit an attorney affidavit of fault, and the court must find that it was the attorney's error and not the client's error which caused the entry of default. However, this provision is NOT concerned with the reasons for the attorney's mistake. Relief from DEFAULT is mandatory if the application is in proper form and the court accepts counsel's declaration of fault. (**Billings**, 225 Cal.App.3d at 256, 275 Cal.Rptr. at 84.)

Ford v. Herndon Distinguishable

Ford v. Herndon, cited by Defendant Wells Fargo, was a paternity action wherein Sarah Ford sued Warner Herndon to establish that he was the father of her child. The father defaulted and the mother obtained

default judgment against him. The trial court denied the father's motion to set aside his default and default judgment. On appeal the trial court affirmed, holding that the father had failed to show excusable neglect.

The father had failed to take reasonable steps to respond to the suit. Despite being served with the summons and complaint, and despite receiving two letters from the district attorney's office, the father failed to hire an attorney or respond to the suit. He went to the district attorney's office and claimed not to be the father of the child. He was told by the DA to hire an attorney, but he failed to do so. He claimed to be indigent and claimed that an attorney should have been appointed for him free of charge, but there was no evidence in the record to prove that he was indigent. He claimed he was denied the chance to submit to a blood test, but there was no evidence to prove this was true.

Accordingly, **Ford v. Herndon** did not involve an attorney affidavit of error, which requires mandatory relief. On the contrary, the father in the Ford case failed to hire an attorney and failed to respond to the lawsuit. Accordingly, any error was entirely the father's fault. And his neglect was inexcusable. That excusable neglect analysis does not apply to this case, which involves an attorney affidavit of fault, and which is governed by a different provision of **CCP 473 (b)**.

2. The court finds attorney's neglect was excusable.

Second, even assuming for the sake of argument, that Plaintiff is required to prove excusable neglect, the court finds that the mistake in this case was inadvertent and excusable. Wells Fargo cites no case law which expressly requires the court to find that the mistake was inexcusable under the facts of this case.

No Monetary Sanctions

The court finds that the dismissal was entered on 3/2/12 due to an attorney error that was inadvertent. Plaintiff was not personally at fault. Plaintiff has sought relief well within the six-month deadline. Defendants TFS Investments and Cal-Western Reconveyance have filed no Opposition. And Defendant Wells Fargo Bank has presented no evidence that it has suffered prejudice or incurred unnecessary costs. So the court will not impose any monetary sanctions on Plaintiff's counsel.

Pursuant to CRC 391 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith (Judge's initials) on 6/6/12 (Date).

(20) **Tentative Ruling**

Re: ***Crop Production Services, Inc. v. Faria***,
Superior Court Case No. 09CECG01838

Hearing Date: **June 7, 2012 (Dept. 403)**

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To grant. Code Civ. Proc. § 437c. Plaintiff is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

The complaint alleges one cause of action for breach of contract and corresponding common counts.

On 12/26/07, plaintiff agreed to furnish goods and services on account to defendant. UMF 1-2. Plaintiff supplied goods and services under the agreement. See UMF 3. Defendant has failed to pay the balance owed, despite demand and plaintiff's performance of its obligations. UMF 4-5. Defendant owes $383,720.85 in principal, plus finance charges at the rate of 18% per annum. UMF 7. The contract contained an attorneys' fee clause. UMF 9.

The burden shifts to defendant to raise a triable issue of fact. Code Civ. Proc. § 437c(c). Having filed no opposition, defendant has not met this burden, and the motion should be granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **6/1/12** (Date).

(19)

Tentative Ruling

Re: ***Serrano v. Selma Auto Mall***
Superior Court Case No. 09CECG01076

Hearing Date: June 7, 2012 (Dept. 503)

Motion: by plaintiff preliminary approval of class action settlement

Tentative Ruling:

To deny without prejudice.

To order that the notice approved by the Court in its January 13, 2010 order be mailed to all class members by June 21, 2012, and that it require any class member wishing to opt-out do so by August 2, 2012. A further status conference will be held on August 21, 2012 at 3:30 p.m. in this Department, and a declaration as to the mailing of class notice and opt-outs received is to be filed on or before August 16, 2012. A further motion for preliminary approval of a settlement may be calendared for the status conference date if the parties desire.

Explanation:

1. Delay in Notice to the Class

The Court issued its order certifying this matter as a class action in September of 2010. On January 13, 2011, the Court issued another order as to class notice. The parties apparently never gave notice to the class, perhaps due to their settlement negotiates. Further delay is not appropriate, and given the relatively small number of class members, easy to accomplish.

2. Prior Denial of Preliminary Approval

In July of 2011, the Court denied a prior application for preliminary approval of a settlement. The parties have now adequately presented an evidentiary foundation for the settlement fund of $140,000, providing possible rescission value as well as the amount of interest allegedly collected improperly. They have also adequately discussed the risks and rewards of proceeding to trial; the amount of the proposed settlement is reasonable.

The Court previously disapproved a provision which barred class counsel from obtaining certain information about his clients. Such a provision nonetheless reappears in Paragraph 6.3. It is still unacceptable.

The Court previously disapproved a provision which absolved class counsel from claims by his clients. Same reappears in paragraph 12.2, stating that class members release class counsel from "any claims arising out of the investigation, initiation, prosecution, or resolution of the Action, including but not limited to claims of defamation, abuse of process, or malicious prosecution." Rules of Professional Conduct, Rule 3.400(b) states that a member of the State Bar may not:

> "Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice."

A provision which violates the Rules of Professional Conduct will not be approved.

3. Substitution of "Settlement Class" for Certified Class

The language of the agreement speaks of a "settlement class," and confines the settlement to such persons. There is, however, already a certified class in this case, and class counsel have been appointed to present all such persons. There is no explanation of how this settlement class differs from the certified class, or whether members of the certified class are omitted therefrom.

If in fact they are the same, a proposed settlement does not change the fact that defendant may contest certification if no settlement is approved. But absent a motion to decertify, the certified class remains. The opt-out question will be answered by the time this matter returns for the status conference. Thus, the language concerning a settlement class or an unknown number of opt-outs found in paragraphs 2.13, 2.24, 7.1, 7.2, and 14.2 is inappropriate.

4. Scope of Release

The release language is found in paragraph 2.21. The problem is the last sentence: "It is the intent by and between the Parties to settle all claims that could have been asserted between them." Paragraph 2.15 notes that parties refers to the Class Representative "for herself and on behalf of the Settlement Class." This matter, so far as the unnamed class members are concerned, involves allegations of pre-contract consummation interest charges. Ms. Serrano has claims outside those found in the class portion of the complaint, for which she receives an additional $15,000. No consideration is provided for the unnamed class members to release all claims that they might have against defendant.

> "[T]here are real dangers in the negotiation of class action settlements of compromising the interests of class members for reasons other than a realistic assessment of usual settlement considerations such as the strength of their legal claims, the desire for immediate rather than delayed relief, and the costs of litigation. Incentives inherent in class-action settlement negotiations that can, unless checked through careful district court review of the resulting settlement, result in a decree in which the rights of class members, including the named plaintiffs may not be given due regard by the negotiating parties. The class members are not at the table; class counsel and counsel for the defendants are. Unlike in the non-class action context, most of class counsel's clients cannot be consulted individually about the terms of the settlement, nor is the resulting decree submitted to the class members for approval (although there is an opportunity to object)."
>
> *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 959-960.

If Ms. Serrano's other claims are worth $15,000 for settlement purposes, a similar settlement would be in order for class members if they are to be bound to the same release. The settlement fund for just such "other" released claims would be $1,365,000 if proportionate to that of Ms. Serrano. It is inappropriate to release unnamed class members' claims which Ms. Serrano agreed in her pleading belong solely to her, not as part of a class action.

Newberg on Class Actions notes that "A settlement may properly prevent class members from asserting claims relying upon a different legal theory different from that relied upon in the class action complaint, but depending upon the ***same set of facts***." See same at section 12:15, in the Chapter for "Drafting the Settlement Agreement," emphasis added.

"The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. "A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . ." *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

The last sentence of the release language in paragraph 2.21 takes the class release far beyond the factual scenario of charging interest prior to a contract's consummation date. This sentence must therefore be removed or modified so as to reflect it applies to Ms. Serrano's claims only.

5. Settlement Disputes

Paragraph 9.2 appoints the Court as arbitrator of any disputes over settlement, with the Court to provide "a final, nonappealable resolution of the dispute." The Court is unwilling to act as an arbitrator of a dispute over a judgment without out recourse to the Court of Appeal. If the parties want a nonappealable arbitration-type procedure, they need to find an outside arbitrator to do that.

6. Choice of Distribution Methods

The class was certified in 2010. The majority of the class members have already received and cashed small checks from defendant; many of them even signed releases. The idea that most will not be interested or might toss out a check seems farfetched in this situation. Use of a claim form, where none is needed to prove a right to participate, is unwarranted.

Option 3, distribution of the $140,000 settlement fund in accordance with the amounts of interest allegedly improperly collected, is the best method. It fairly distributes the fund, without artificial roadblocks like claim forms. If someone does not want their check, they can discard it.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **A.M. Simpson** (Judge's initials) **on** **5-31-12** (Date).

(20) **Tentative Ruling**

Re: ***Rodriguez v. Cummings et al.***
Superior Court Case No. 11CECG01300

Hearing Date: **June 7, 2012 (Dept. 501)**

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny, without prejudice, unless counsel appears with additional information and papers, as necessary, addressing the issues described below, which would then be considered during the hearing. Counsel will need to call and request oral argument if he intends to appear with new papers at the hearing. Otherwise, Counsel shall comply with Local Rule 2.8.4.

Explanation:

Petitioner checked box 19b(3), indicating that the balance of $34,606.43 would be invested in a single-premium deferred annuity, subject to withdrawal only upon authorization of the court. Yet attachment 19b(3) includes a booklet describing various mutual funds managed by J.P.Morgan Asset Management. This needs clarification.

The Court also requires explanation and justification for reimbursement to the minor's parents of $968.14 for re-upholstery of a vehicle and $1,200 for loss of earnings.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith (Judge's initials) on 6/1/12 (Date).

Tentative Ruling(24)

Re: ***Robert Warren Rosenbaum dba Carr Bazaar v. Ash & Gist Accountancy Group, et al.***
Court Case No. 11CECG03017

Hearing Date: **June 7, 2012 (Dept. 503)**

Motion: Defendants' Motion to Stay Action

Tentative Ruling:

To deny.

Explanation:

This request to stay the action is entirely discretionary on this court. The court has inherent power to stay proceedings as part of its power to control its own docket in the interests of judicial economy, as well as economy for counsel and litigants. [*Landis v. N. Am. Co.* (1936) 299 U.S. 248, 254; *Chavarria v. Superior Court* (1974) 40 Cal.App.3d 1073, 1075-1076] Courts sometimes stay malpractice actions pending resolution of an underlying dispute giving rise to the malpractice claim. [*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503] However, appellate courts reviewing a trial court's decision on a request for discretionary stay focus on abuse of discretion in *either* granting or denying stay, and if discretion is not abused, the court's decision will not be disturbed on appeal. [See, *e.g., Leeds v. Superior Court of Los Angeles County* (1965) 231 Cal.App. 2d 723, 724-725—upholding denial of stay where no abuse of discretion shown; see also *Chavarria v. Superior Court* (1974) 40 Cal.App.3d 1073—depriving plaintiffs of a remedy (double damages) by granting stay would be abuse of discretion, but since the remedy was not lost by staying action, no abuse shown.]

Defendants' motion is premised on the argument that until plaintiff's tax appeal is finalized, he has no actual damages, so he cannot possibly prove his cause of action for malpractice. Defendants correctly point out that in order to prove a case of accounting malpractice, plaintiff must prove actual damages, and "nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." [*Int'l Engine Parts v. Feddersen & Co.* (1995) 9 Cal.4th 606, 614 (internal citations omitted)] However, the cases cited to *for the first time* on Reply do not support a conclusion that Mr. Rosenbaum has no actual damages at this point in time.

Most of the cases cited to concern the issue of determining when a statute of limitations started, rather than the issue of discretionary stays. But since statutes of limitation are determined by *when actual harm occurred* (see, *e.g., Int'l Engine Parts v. Feddersen & Co.* at 611), the discussion is helpful here to test defendants' argument that no harm has yet occurred to plaintiff in this action.

First, it should be noted that in *Int'l Engine Parts v. Feddersen & Co*. ("*Int'l Engine Parts*"), *supra,* the California Supreme Court clearly stated that it was the *fact of damage* giving rise to the professional liability that determined the start of the statutory clock, and *not* "the amount of inchoate monetary damages that may have been incurred after the initial discovery of the malpractice." [*Int'l Engine Parts* at 614] The Court noted that in previous cases the discussion of when damage occurred often focused on the concept of "irremediable damage," generally where a plaintiff lost the underlying action, and then waited to file the resulting malpractice action until after exhausting appeals on the underlying action (reasoning similarly to defendants here, that until appeals were exhausted there was no way to tell if there was any actual damage).

However, the Supreme Court in *Int'l Engine Parts* noted that that it had specifically *rejected* the rule of "irremediable damage" in *Laird v. Blacker* (1992) 2 Cal.4th 606, 612-614 ("*Laird*"). In *Laird,* the Supreme Court found that the point of actual injury "is on *discovery* of the malpractice and actual injury, not success on appeal or proof of the total amount of monetary damages suffered by the former client." [*Laird* at 614, emphasis in the original] Specifically (and contrary to defendants' arguments on this motion), the statute of limitations was not tolled until all appeals were exhausted. The Court in *Laird* stated, "We disagree with plaintiff that actual injury should be defined in terms of monetary amount and that a successful appeal negates the client's ability to file a malpractice action." [*Id.*]

Relying on this clear precedent, the California Supreme Court in *Int'l Engine Parts* applied this reasoning specifically to a case of accounting malpractice. It noted that *preliminary findings* and *proposed* assessments by the taxing agency would not signal injury. But once *a deficiency is assessed,* that constituted injury/damage. "The taxpayer to whom a notice of deficiency is sent is put to the choice of paying the deficiency, incurring the expense of petitioning for redetermination, or facing collection by the government. (Int. Rev. Code, § 6213(a) & (c).) [The plaintiffs] had at that point suffered [actual] harm." [*Int'l Engine Parts* at 618, quoting from *McKeown v. First Interstate Bank* (1987) 194 Cal.App.3d 1225, 1229, brackets added by the Court]

Thus, it found that "the question whether the taxpayer suffered actual injury as a result of the accountant's allegedly negligent preparation of the tax returns is *contingent on the outcome of the audit*." [*Int'l Engine Parts* at 619, emphasis added.] The Court was not persuaded by the argument (as defendants argue here) that *actual injury* did not occur until "final adjustment and deficiency assessment from the IRS." [*Id.* at 617] It found this reasoning in error because it "confused the *determination* of tax liability with *finalization* of the audit process, at which point the tax deficiency is actually assessed." [*Int'l Engine Parts* at 617, emphasis in the original]

Clearly, this case, resting on so many other clear precedents, does not support defendants' argument that the BOE's determination of tax liability does

not constitute "actual damages" until appeals are exhausted. Here, plaintiff has alleged that he was audited and that a determination was issued. Under the reasoning of *Int'l Engine Parts*, damage ("actual injury") occurred when the tax deficiency was actually assessed and plaintiff was put to the choice of whether or not to appeal that assessment. While it may be true that the final amount of damages may change depending on the outcome of plaintiff's appeal process, this does not mean that the malpractice case must necessarily be stayed, especially at such an early stage of this litigation. For instance, this certainly provides no basis to stay discovery. There is no basis shown for a discretionary stay at this time.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: **A.M. Simpson** (Judge's initials) **on** **6-5-12** (Date).

(6)

Tentative Ruling

Re: ***Wells Fargo Bank, N.A. v. Dhaliwal***
Superior Court Case No.: 12CECG00654

Hearing Date: June 7, 2012 (**Dept. 403**)

Motion: Demurrer by Defendants Gurbinder S. Dhaliwal, and Gurcharan S. Dhaliwal aka Dhaliwal S. Gurcharan

Tentative Ruling:

To sustain the general demurrer, and to overrule the special demurrer, with Plaintiff granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Defendant's special demurrer for uncertainty to the first cause of action for breach of contract is overruled because Defendant has not distinctly specified exactly how or why the pleading is uncertain, and where the uncertainty allegedly appears by reference to page and line numbers of the complaint. (*Fenton v. Groveland Community Services District* (1982) 135 Cal.App.3d 797, 809, overruled in part on other grounds in *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 328.)

The first cause of action for breach of contract fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

In California, a complaint or cross-complaint shall contain both of the following: (1) A statement of the facts constituting the cause of action, in ordinary and concise language; and (2) A demand for judgment for the relief to which the pleader claims to be entitled. (Code Civ. Proc. §425.10.) What this means is that the cause of action must allege every fact which the plaintiff is required to prove in order to allege the facts, or elements, necessary to constitute a cause of action. Every fact essential to the claim or defense should be stated or the pleading is subject to demurrer. (Code Civ. Proc. §425.10, Code Commissioners' Note.) The fact-pleading requirement obligates plaintiff to allege ultimate facts that apprise the defendant of the factual basis of the claim. (*Davaloo v. State Farm Insurance Co.* (2005) 135 Cal.App.4th 409, 415.)

A form complaint, standing alone, is no more immune to demurrer than any other complaint that fails to meet essential pleading requirements to state a cause of action. (*People ex rel. Dep't of Transportation v. Superior Court* (1992) 5 Cal. App. 4th 1480, 1486.)

Here, although the incorporation by reference of the "Credit Card Account Agreement" sufficiently alleges the terms of the contract, it is impossible to identify all the alleged parties to the contract. (Civ. Code, §1588.) A cause of action for damages for breach of contract must allege the contract, and either do so by its legal effect or by attaching a copy of the written agreement. (*Gilmore v. Lycoming Fire Insurance Co.* (1880) 55 Cal. 123, 124.) Attaching a copy of the agreement that does not identify all the parties, when the agreement itself calls for identification of the parties to mean the person who signed the credit card application or otherwise requested a credit card account at ¶1, doesn't sufficiently allege the contract.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **6/5/12** (Date).

(19) Tentative Ruling

Re: ***Olivares v. Fresno Unified School District***
Superior Court Case No. 10CECG02046

Hearing Date: June 7, 2012 (Department 402)

Motion: by defendant for summary judgment

Tentative Ruling:

To deny.

Explanation:

The Court first notes that the majority of Appellate Districts find it not permissible to provide new evidence with reply papers for a motion for summary judgment. *Haney v. Aramark Uniform Services, Inc.* (5th Dist., 2004) 121 Cal. App. 4th 623, 636 - 638 (*rev. denied*); *Mills v. Forestex Co*. (5th Dist. 2003) 108 Cal. App. 4th 625, 640-641; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal. App. 4th 1224, 1244. The above notwithstanding, Defendant's "new evidence" merely serves to dispute Olivares facts creating a triable issue.

In *Iverson v. Muroc Unified School Dist*. (1995) 32 Cal. App. 4th 218, 228, the Fifth District Court of Appeal made this ruling:

> "School districts and their employees are placed under a general duty to supervise the conduct of children on school grounds during school sessions, school activities, recesses and lunch periods . . . Whether or not a district is negligent in affording supervision of pupils is a question of fact. (*Rodrigues v. San Jose Unified School Dist.* (1958) 157 Cal. App. 2d 842, 845-846 [322 P. 2d 70].)"

The School in *Iverson* made a strikingly similar argument as does defendant here (at page 221):

> "The District moved for summary judgment. It argued section 831.7 was dispositive because plaintiff was participating in a hazardous recreational activity in which he voluntarily placed himself at risk. The District pointed to Michael's deposition testimony in which he acknowledged he played league soccer in the lower grades prior to his injury, and after he recovered from the fractured arm he again played soccer in physical education class."

However, the Court of Appeal reversed a summary judgment granted in favor of the school district. The injury was two fractures, suffered during a soccer game.

See also *J.H. v. Los Angeles Unified School Dist*. (2010) 183 Cal. App. 4th 123: "The law regarding the duty of supervision on school premises is very, very well established. It is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection." (*Id*. at 139.)

That court cited *Lucas v. Fresno Unified Sch. Dist*. (5th Dist. 1993) 14 Cal. App. 4th 866. The Fifth District Court of Appeal reversed a summary judgment for defendant, won on the basis of assumption of the risk. In that case, the plaintiff and other children were voluntarily engaging in a dirt clod throwing fight when plaintiff was hit in the eye. The Court of Appeal relied on the special relationship doctrine in finding that non-liability could not be found as a matter of law at the summary judgment stage.

> "Supervision during recess and lunch periods is required, in part, so that discipline may be maintained and student conduct regulated. Such regulation is necessary precisely because of the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm."
>
> (*Id*. at 872.)

In fact, the Court found that under such circumstances, assumption of the risk did not apply (*Id.* at 872-873):

> "In view of the existence of a clearly defined legal duty on the part of the District to supervise plaintiff John Lucas and his fellow students to prevent precisely what occurred in the case at bar, we conclude that regardless of what approach is made to the applicability of the doctrine of implied assumption of risk--be it the duty analysis, the consent-based analysis or Justice Mosk's view, the doctrine would not bar plaintiffs' recovery. Under the duty analysis, the case falls within the secondary assumption of risk category--the District owed a duty of care to John Lucas, who proceeded to encounter a known risk occasioned by the District's breach of that duty. Under the consent-based approach recovery would not be barred by assumption of the risk because John Lucas was within the class of persons Education Code section 44807 and California Code of Regulations, title 5, section 5552 were designed to protect and it cannot be held, as a matter of law, he voluntarily assumed the risk the District would breach its legally imposed duty of care. And,

of course, Justice Mosk would eliminate the doctrine of implied assumption of risk as a bar to recovery."

These cases raise a question as to whether assumption of the risk can be asserted at all in a case like this. Under these circumstances, the motion must be denied.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 6/6/2012 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Central California Financial, LLC v. DC Construction Group, Inc.***
Superior Court Case No.: 11CECG02097

Hearing Date: June 7, 2012 (**Dept. 502**)

Motion: Default judgment prove up by Defendant Central California Financial, LLC,

Tentative Ruling:

To deny, without prejudice.

Explanation:

There was no request for court judgment filed for either DC Construction Group, Inc., aka D & C Concrete, Inc., or Charles Millhollin ("Defendants"). This is a separate step from entry of default (even though the same form is used). (Code Civ. Proc. §585, subd. (b)—"The plaintiff thereafter [after entry of default by the clerk] may apply to the court for the relief demanded in the complaint.")

Costs sought must be listed on the back of the request for court judgment form in #7.

The facts stated in the affidavits or declarations must be within the personal knowledge of the affiant or declarant and must be set forth with particularity. Each affidavit or declaration must show affirmatively that the affiant or declarant, if sworn as a witness, can testify competently to the facts contained therein. (Code Civ. Proc. § 585, subd. (d).) Plaintiff must "prove-up" his or her right to relief, by introducing sufficient evidence to support the claim. Without such evidence, the court may refuse to grant a default judgment for any amount, notwithstanding defendant's default. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.)

It is unclear how Mary Hooper, who is the "general manager" of Plaintiff, Central California Financial, LLC ("Plaintiff"), would know the amounts owed on the contracts. She says that Central California Kenworth's and Cozad Trailer Sales, LLC's "rights, title and interest in and to the causes of action against" Defendants was assigned to Plaintiff. (Complaint, ¶¶7, 18, 29, 40.) Does this mean that Defendants stopped paying before the contracts were assigned, or were they assigned after the sale? Ms. Hooper states in ¶2 of her declaration that she has "authority to execute written agreements with customers and contractually bind Plaintiff, and [that her] . . . regular employment duties include oversight of the enforcement and collection of payments pursuant to the aforementioned

agreements. I am also the custodian of records for Plaintiff." (Decl. of Mary Hooper, ¶2.) Yet, none of the contracts is between Plaintiff and the Defendants – all four are either between Central California Kenworth and Defendants or Cozad Trailer Sales, LLC, and Defendants. Simply being the "custodian of records" with authority to bind *Plaintiff* contractually doesn't establish that she has personal knowledge as to the amounts allegedly due under the contracts and personal guarantees which are between these other entities and Defendants. (Code Civ. Proc., subd. (d).)

Nor does Ms. Hooper's declaration show affirmatively that she is competent to testify as to the value of the collateral sought to be returned, or to the amount of the income lost by Plaintiff if the collateral was being leased.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **6-6-12** (Date).

[25] **Tentative Ruling**

RE: ***E.C. v. Clovis Unified School District***
Case No. 10 CE CG 00827

Hearing date: June 7, 2012 (Dept. 502)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To approve the minor's compromise. Order to be submitted for signature. Hearing off calendar. **This approval is conditional upon the terms of the special needs trust being approved by this Court's probate department.**

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **6-6-12**
Issued By: _____ on _____.
(Judge's initials) (Date)